

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

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DISTRICT OF UTAH

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OREO CORP., an Ohio corporation,

BY:

Case No. ~~02-03cv1089~~ DS

Plaintiff,

vs.

MEMORANDUM DECISION
AND ORDER

BHV EQUITY ASSOCIATES, LLC,
et al.,

Defendants.

* * * * *

Defendant BHV Equity Associates, LLC ("BHV") moves to quash Plaintiff's Lis Pendens. The relevant factual allegations are stated in the pleadings and will not be repeated here. In a nutshell, Plaintiff claims an interest in 60.32 shares of water stock issued by Defendant Summit Water Distribution Company. After commencing this action, Plaintiff filed a Lis Pendens with the Summit County Recorder.

BHV asserts that the Lis Pendens should be quashed because shares of stock in a water company constitute personal property, rather than real property. Thus, BHV contends that the litigation does not affect the right to or possession of real property and the Lis Pendens was improperly filed.

As a general rule water rights in Utah are considered real property. See Utah Code Ann. § 57-1-1(3) ("Real property" ...

means any right, title, estate, or interest in land, including ... all water rights..."). In Salt Lake City Corp. v. Cahoon & Maxfield Irrigation Co., 879 P.2d 248, 253 (Utah 1994), the Utah Supreme Court held "that stock in a mutual irrigation corporation represents a real property interest and therefore is not a certificated security under Utah Code Ann § 70A-8-102 (1990)". The Utah Supreme Court noted that it "has long held that the rights to the use of water reflect 'an interest in real property'" and that "[p]ooling the rights to the use of water in a mutual irrigation corporation does not change their nature, and thus they retain their real property characteristics." Id. at 251. The court clarified its holding stating "we fully appreciate the real property nature of water rights, and while stock memorializing the ownership of such may be classified as personal property, such stock, in fact, represents a real property interest." Id. at 252 n.8.

In an apparent response to Cahoon, the Utah Legislature amended § 73-1-10(2) to provide that "[t]he right to the use of water evidenced by shares of stock in a corporation shall be **transferred** in accordance with the procedures applicable to securities set forth in Title 70A, Chapter 8, Uniform Commercial Code-Investment Securities". (emphasis added). Notwithstanding BHV's reliance on § 71-1-10(2) for support of its position, the

court reads that provision as simply stating that shares of stock in a water company "shall be transferred" using the same procedure applicable to securities, not that shares of stock in a water company are personal property. See Utah v. Huntington-Cleveland Irrigation Co., 52 P.3d 1257, 1261 (Utah 2002) (in interpreting a statute, the court presumes that the legislature used each word advisedly and gives effect to the term according to its ordinary meaning).

Water rights by statute are presumed appurtenant so that they pass with the land unless specifically reserved. Utah Code Ann. § 73-1-11(1). However, there is a rebuttable presumption that shares in a water company are not appurtenant. Id. at § 73-1-11(4); Brimm v. Cache Valley Banking Co., 269 P.2d 859, 864 (Utah 1954); Abbott v. Christensen, 660 P.2d 254, 256 (Utah 1983). That presumption may be rebutted by "clear and convincing evidence that said water right was in fact appurtenant and that the grantor intended to transfer the water right with the land". Brimm, 269 P.2d at 864. For purposes of this motion only, the court is satisfied that Plaintiff has rebutted the statutory presumption. See Mem. Opp'n at Ex. 2, ¶¶ 10-11; Ex. 3 at ¶ 6; and Ex. 4 at ¶ 6. Therefore, BHV's reliance on § 73-1-11(4) for support is misplaced in this instance.

For these and the other reasons articulated by Plaintiff in its pleading, the court concludes that BHV has failed in its burden as the moving party to establish that it is entitled to the relief requested.

Therefore, **IT IS HEREBY ORDERED** that BHV's Motion to Quash Lis Pendens is **DENIED**.

DATED this 12th day of May, 2004.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "David Sam", is written over a horizontal line.

DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Utah
May 13, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-01089

True and correct copies of the attached were either mailed, faxed or e-mailed
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